No. 80-1391

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IN THE

Supreme Court of the United States

October Term 1980

FIRST NATIONAL BANK OF OMAHA and FIRST OF OMAHA SERVICE CORPORATION,

Petitioners,

vs.

THE MARQUETTE NATIONAL BANK OF MINNEAPOLIS,

Respondent.

On the Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I.

Is an anticompetitive intent or purpose, without more, sufficient to render lobbying and litigation activities actionable under the "sham exception" to the *Noerr-Pennington* Doctrine?

II.

Does the civil enforcement of a state statute limiting the rate of interest which national banks may charge in connection with bank credit card programs constitute the deprivation of any rights, privileges, or immunities secured by the Constitution or laws of the United States within the meaning of 42 U.S.C. §1983?

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS OF THE COURT BELOW

The opinion rendered in this matter by the United States Court of Appeals for the Eighth Circuit is reported as *First National Bank of Omaha v. The Marquette National Bank of Minneapolis,* 636 F.2d 195 (8th Cir. 1980). The opinion rendered in this matter by the United States District Court for the District of Minnesota is reported as *First National Bank of Omaha v. The Marquette National Bank of Minneapolis,* 482 F. Supp. 514 (D. Minn. 1979).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions set forth by Petitioners, Respondent relies upon certain provisions of the First and Fourteenth Amendments to the Constitution of the United States:

First Amendment

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

STATEMENT OF THE CASE

This lawsuit arises out of prior litigation involving the same parties, which prior litigation resulted in a decision by this Court. *See, The Marquette National Bank of Minneapolis v. First of Omaha Service Corporation,* 439 U.S. 299 (1978). *See also same case, The Marquette National*

Bank of Minneapolis v. First of Omaha Service Corporation, 262 N.W. 2d 358 (Minn. 1977), *cert. granted,* 436 U.S. 916 (1978). The factual and procedural history of the earlier litigation (hereinafter referred to as "the Injunction Suit") is discussed in the prior Opinion of this Court and will only be summarized below. *See,* 439 U.S. at 301-307.[1]

The Injunction Suit was commenced in May, 1976 by The Marquette National Bank of Minneapolis ("Marquette") in Hennepin County District Court, State of Minnesota. Marquette alleged that the First National Bank of Omaha ("First National"), by and through its wholly owned subsidiary, First of Omaha Service Corporation ("the Service Corporation"), was conducting a bank credit card program in the State of Minnesota in violation of the interest rate limitations of Minnesota's Bank Credit Card Act (M.S.A. §48.185). The Minnesota Attorney General intervened as a party plaintiff in the suit and joined Marquette in a motion for an injunction to prohibit the Service Corporation from engaging in any solicitation or other activity in connection with said credit card program so long as the program continued to be in violation of Minnesota's Credit Card Act. In February, 1977, the aforesaid motion of Marquette and the State of Minnesota was granted by the Hennepin County District Court and a permanent injunction was entered against the Service Corporation.

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[1]A copy of the appendix filed with this Court in the Injunction Suit, containing a true and correct printing of relevant documents from the lower court record in that suit, was submitted in support of the motion for partial summary judgment to the District Court in the present action as Exhibit 1 to the Affidavit of J. Patrick McDavitt, and was included in the record to the Eighth Circuit Court of Appeals in the present case (App. p. 31).

The Service Corporation appealed the permanent injunction to the Minnesota Supreme Court and, in November, 1977, after nearly eight months of deliberation, the Minnesota Supreme Court reversed the permanent injunction, in a decision which produced three dissents. 262 N.W. 2d 358. The majority opinion based the reversal on the view that under Section 85 of the National Bank Act (12 U.S.C. §85), and the judicially applied "most favored lender" rule, First National was authorized to operate its bank credit card program in Minnesota at the higher interest rate percentages permitted by the laws of the State of Nebraska. 262 N.W. 2d at 362-366. On Marquette's posting of a $10,000 bond (App. pp. 31-32), the Minnesota Supreme Court stayed the effectiveness of its decision until such time as review could be obtained in the United States Supreme Court (App. p. 65).

This Court granted review in the Injunction Suit upon separate petitions for writs of certiorari filed by Marquette and by the State of Minnesota. 436 U.S. 916. On December 18, 1978, this Court affirmed the decision of the Minnesota Supreme Court. 439 U.S. 299. This Court held that when First National enrolled Minnesota residents, merchants and banks in its bank credit card program, it continued to be "located" in the State of Nebraska for purposes of 12 U.S.C. §85 (439 U.S. at 309-313); and that, in connection with the operation of said program in the State of Minnesota, First National was authorized by §85 to charge the interest rate allowed under Nebraska law and was not limited to the interest rate established by Minnesota's Bank Credit Card Act (439 U.S. at 313-19).

Having ultimately succeeded before this Court in the Injunction Suit, the Service Corporation and its parent

corporation, First National, commenced the present action against Marquette alleging that, together with its lobbying for passage of Minnesota's Bank Credit Card Act, Marquette's pursuit of the Injunction Suit was a violation of the federal antitrust laws (15 U.S.C. §§1 and 2) and the Civil Rights Act of 1871 (42 U.S.C. §1983) and, is actionable under common law theories of malicious prosecution, abuse of process, and tortious interference with business (App. p. 55, *et seq.*).[2] More specifically, it is alleged that Marquette lobbied for passage of the Minnesota Bank Credit Card Act and pursued the Injunction Suit for the purpose and intent of "prevent[ing] the First National's credit card program from being introduced in Minnesota and thereby to prevent effective price competition with the Marquette's credit card program" (App. p. 62).

Marquette answered the Complaint in the present action by denying any improper motive or purpose in the pursuit of its aforesaid lobbying and litigation activities (App p. 38-40) and by asserting the affirmative defense that, even if such activities were motivated solely out of anticompetitive purposes, they are protected under the right of petition embodied in the First Amendment to the United States Constitution (App. p. 40-41). Shortly after filing its Answer, Marquette moved for an order dismissing the Complaint, or, in the alternative, for partial summary judgment on the grounds that, even assuming all the allegations in the Complaint to be true, neither First

[2]By electing not to seek review of the Court of Appeals' affirmance of summary judgment dismissing the causes of action for malicious prosecution and abuse of process (Petition at p. 4), First National and the Service Corporation have apparently decided to abandon those claims.

National nor the Service Corporation has a cause of action arising out of Marquette's lobbying for passage of the Minnesota Bank Credit Card Act, or upon Marquette's conduct of the Injunction Suit. On December 11, 1979, the District Court granted Marquette's motion for partial summary judgment (App. p. 10, *et seq.*). The Eighth Circuit Court of Appeals affirmed said partial summary judgment on November 25, 1980 (App. p. 1, *et seq.*).

ARGUMENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

I.

The Decisions of the Courts Below Concerning the *Noerr-Pennington* Doctrine are Consistent with the Previous Decisions of This Court and the Court of Appeals in Other Circuits

The District Court relied on *Noerr-Pennington* considerations in holding that, to the extent Petitioners' claims are based upon Marquette's lobbying for passage of Minnesota's Bank Credit Card Act and its conduct of the Injunction Suit, Petitioners have no claim against Marquette either under the antitrust laws, the civil rights laws,[3] or the state common law theory of tortious interference with business (App. pp. 14-26, and p. 28). 482 F. Supp. at 517-22 and at 524-25. In its opinion affirming the District Court, the Court of Appeals adopted *in toto* the District Court's analysis of the *Noerr-Pennington* issues (App p. 3). 636 F. 2d at 197.

[3]In addressing Petitioners' Civil Rights Act claim, the District Court also cited the inapplicability of 42 U.S.C. §1983 to the factual setting pleaded in the Complaint (App. pp. 26-27). 482 F. Supp. at 522.

Petitioners assert that the courts below misinterpreted the decisions of this Court concerning the *Noerr-Pennington* Doctrine

> "by interpreting them as holding that improper intent or purpose in conducting lobbying or litigation is not a sufficient basis upon which to rest civil liability, but that in addition there must be a showing of repetitive, baseless litigation, unethical or abusive conduct, such as perjury, fraud or bribery, or conduct which bars meaningful access to adjudicatory tribunals." Petition, p. 11.

Under Petitioners' view, the presence of an anticompetitive purpose, without more, renders lobbying and litigation activities unlawful and outside the protection of the First Amendment right of petition. *Id.*

The most succinct response to First National's argument is found in the direct statements of the *Noerr-Pennington* Doctrine given in the namesake decisions rendered by this Court:

> *Eastern R. R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961)
>
> "The fact . . . that the railroad's sole purpose in seeking to influence the passage and influence of laws was to destroy the truckers as competitors * * * even if adequately supported in the record, could not transform conduct otherwise lawful into a violation of the Sherman Act." 365 U.S. at 138-139.
>
> * * *
>
> "The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot be made to depend upon their intent in doing so." *Id.* at 139.

United Mine Workers of America v. Pennington, 381 U.S. 657 (1965)

> "Nothing could be clearer from the Court's opinion [in Noerr] than that anticompetitive purpose did not illegalize the conduct there involved." 381 U.S. at 669.
>
> * * *
>
> "Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose." *Id.* at 670.

The basic precept of *Noerr-Pennington* has been, and remains, as stated above. The lawful exercise of the right of petition is not rendered illegal merely because the motive or purpose of such activity is to attain some anticompetitive advantage. This Court reconfirmed this precept in *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508 (1972), wherein the constitutional protection afforded lobbying activities was also recognized as being equally applicable to the litigation activities:

> "We conclude that it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the anti-trust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-a-vis* their competitors." 404 U.S. at 510-11.

The act of petitioning government cannot, therefore, subject one to civil liability "even though intended to eliminate competition." *Pennington, supra,* 381 U.S. at 670.

It is, of course, an entirely different matter when one

not only pursues lobbying and litigation activities out of an anticompetitive motive but also engages in some abuse of the legislative or judicial process through one or more "forms of illegal and reprehensible practice which may corrupt [such] processes." *California Motor Transport, supra,* 404 U.S. at 513. This is the so-called "sham exception" to the *Noerr-Pennington* Doctrine. The specific "forms of illegal and reprehensible practice" referred to in *California Motor Transport* were the denial of "free and unlimited access" to governmental tribunals (*Id.* at 511); the existence of perjury, fraud or bribery (*Id.* at 512-13); or "a pattern of baseless, repetitive claims" (*Id.* at 513). Since the Complaint attributes none of these practices to Marquette, the District Court held that there was no basis to bring Marquette's lobbying and litigation activities within the "sham exception" to *Noerr-Pennington* (App. p. 24). 482 F. Supp. at 521.[4]

Petitioners' view, that the presence of an anticompetitive intent and purpose is, by itself, sufficient to invoke the "sham exception" to *Noerr-Pennington,* is not supported by *California Motor Transport.* Nor is Petitioners' view supported by any of the other decisions of this Court.

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[4]The District Court also correctly rejected any suggestion that Marquette did not have the constitutional right to pursue the Injunction Suit if, as alleged by Petitioners, it "knew" or should have known, in advance, that this Court would ultimately find Minnesota's Bank Credit Act to be preempted by §85 of the National Bank Act. Citing the Ninth Circuit's decision in *Subscription T.V. v. Southern California Theater Owners,* 576 F. 2d 230 (9th Cir. 1978), the District Court held that

> "Marquette was entitled to petition its state legislature for passage of an act (even if the act was considered unconstitutional by Marquette), and is not subject to the 'sham exception' absent some allegation of illegality in the legislative process or unethical abuse of the lobbying process." (App. p. 20). 482 F. Supp. at 519.

It is, of course, absurd to suggest that a suit which results in divided opinions among members of the Minnesota Supreme Court and is granted certiorari by this Court should be considered to be without any merit *ab initio.* 482 F. Supp. at 522-24.

Nor is there support for such a view in any of the numerous Court of Appeals' decisions which have faced the issue subsequent to *California Motor Transport.* This Court and the Court of Appeals have consistently held that, in order for lobbying and litigation activities to be actionable, something more than an anticompetitive intent must be present. *See, Otter Tail v. United States,* 410 U.S. 366, 380 (1973) ("repetitive lawsuits carrying the hallmark of unsubstantial claims"); *Vendo Co. v. Lektro Vend,* 433 U.S. 623, 635, fn. 6 (1977) ("repetitive, sham litigation");[5] *Semke v. Enid Automobile Dealers Assoc.,* 456 F. 2d 1361, 1366-67 (10th Cir. 1972) ("fraud, corruption or misuse of the state processes"); *Metro Cable Co. v. CATV of Rockford, Inc.,* 516 F. 2d 220, 232 (7th Cir. 1975) ("conduct that was not genuinely aimed at securing favorable governmental action but at discouraging competitors from seeking governmental action"); *Franchise Realty v. S.F. Loc. Joint Exec. Bd.,* 542 F. 2d 1076, 1084 (9th Cir. 1976), *cert. denied,* 430 U.S. 940 (1977) ("used the threat of litigation as a bludgeon in its attempts to retain its monopoly"); *Feminist Women's Health Center v. Mohammad,* 586 F. 2d 530, 543, fn. 6 (5th Cir. 1978), *cert. denied,* 444 U.S. 924 (1978) ("the petitioning was not a genuine effort to influence public officials to take governmental action"); *Hahn v. Codding,* 615 F. 2d 830, 840 (9th Cir. 1980)

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[5]The issue of whether a single, abusive lawsuit, as opposed to a "pattern of baseless, repetitive claims," is sufficient to come within the "sham exception" was addressed but left undecided in *Vendo.* This, however, does not provide a basis for review in the present case since the District Court held that, even assuming the pursuit of a single, abusive lawsuit could subject one to civil liability, there was no abuse of process in Marquette's pursuit of the Injunction Suit (App. pp. 21-24). 482 F. Supp. at 520-21.

("overlapping, repetitive, and baseless lawsuits"). *See also, Wilmonite, Inc. v. Eagan Real Estate, Inc.*, 454 F. Supp. 1124, 1131 (N.D. N.Y. 1977), *aff'd*, 578 F.2d 1372 (2d Cir. 1978), *cert. denied*, 439 U.S. 983 (1978) ("the corruption of the administrative or judicial process").

In applying *Noerr-Pennington* principles to Petitioners' alleged claims for violation of the Civil Rights Act and for tortious interference with business, the District Court did so on the basis that the First Amendment right of petition affords protection against such claims (when they are based upon lobbying and litigation activities) in the same manner as protection is afforded against antitrust claims (App. pp. 25-26 and p. 28). 482 F. Supp. at 521-22 and 524-25. The Court of Appeals affirmed (App. p. 3 and pp. 7-8, fn. 4). 636 F. 2d at 197 and 199, fn. 4.

While it is true that this Court has not rendered an opinion regarding the application of *Noerr-Pennington* principles to claims for violation of the Civil Rights Act or for tortious interference with business, the District Court's decision in this regard is supported by all of the lower courts which have faced the issue, including two cases in which this Court has denied review. *See, Stern v. United States Gypsum, Inc.*, 547 F. 2d 1329, 1344 (7th Cir. 1977), *cert. denied*, 434 U.S. 975 (1977) (civil rights claim brought under 42 U.S.C §1985); *State of Missouri v. National Organization for Women, Inc.*, 620 F. 2d 1301, 1316-19 (8th Cir. 1980), *cert. denied*, — U.S. —, 101 S. Ct. 122 (1980) (tortious interference with business claim); *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607, 614-15 (8th Cir. 1980) (civil rights claim brought under 42 U.S.C. §1983); *Sierra Club v. Butz*, 349 F. Supp.

934, 938 (N.D. Calif. 1972) (tortious interference with business claim); *Weiss v. Willow Tree Civic Ass'n*, 467 F. Supp. 803, 816-818 (S.D. N.Y. 1979) (civil rights claim brought under 42 U.S.C. §1983); *Pennwalt Corp. v. Zenith Laboratories, Inc.*, 472 F. Supp. 413, 424 (E.D. Mich. 1979), *appeal dismissed*, 615 F. 2d 1362 (6th Cir. 1980) (tortious interference with business claim).

II.

The Circuit Court's Decision Regarding §1983 is Not in Conflict with *Maine v. Thiboutot*

The District Court's summary judgment and dismissal of Petitioners' Civil Rights Act claim was based on three alternative grounds: (1) "that the *Noerr-Pennington* immunity . . . should also be applied to a claim based upon §1983" (App. p. 25); (2) "that §85 of the National Bank Act [does not] secure 'a right, privilege and immunity' within the meaning of the Civil Rights Act" (App. p. 27); and (3) "that §1983 privides a cause of action only for deprivations of federal statutory rights which provide for 'equal rights' or 'the protection of civil rights' " (App. p. 27). 482 F. Supp. at 521-22.

In connection with the last of the above alternative grounds, the District Court did not have the benefit of this Court's decision in *Maine v. Thiboutot*, — U.S. —, 100 S. Ct. 2502 (1980), wherein it was held that the reach of §1983 is not limited to the deprivation of civil rights or equal protection laws. 100 S. Ct. at 2504-06. Cognizant of this clarification of the scope of §1983, the Court of Appeals cited the other two alternative grounds relied upon by the District Court in granting summary

judgment on the Civil Rights Act claim (App. pp. 5-7). 636 F. 2d at 198-99.

In their Petition for Certiorari herein, Petitioners contend that the Court of Appeals' decision is in conflict with *Maine v. Thiboutot*. Certainly this would be true if the Court of Appeals had affirmed the dismissal of the Civil Rights Act claim on the ground that causes of action under §1983 are limited to deprivation of civil rights or equal protection laws. However, as noted above, this ground was *not* the basis for the Court of Appeals' decision. The Court of Appeals recognized that federal laws which grant "rights, privileges or immunities" to the citizenry are within the scope of §1983; however, it also held that the *authority* given national banks to charge a certain rate of interest under 12 U.S.C. §85[6], is not "a right, privilege or immunity secured by federal law within the meaning of 42 U.S.C. §1983" (App. p. 5). 636 F. 2d at 198. This ruling is not in conflict with *Thiboutot*.

The Court of Appeals also noted that Petitioners' Civil Rights Act claim could also be denied on *Noerr-Pennington* principles:

> "The interests in protecting citizens' right of petition and free speech that were found to outweigh the statutory restrictions in [antitrust] cases seem equally as strong here and could provide an alternative ground for immunizing Marquette from penalty under Section 1983." (App. p. 8, fn. 4). 636 F. 2d at 199, fn. 4.

As discussed earlier herein, other lower courts have similarly applied *Noerr-Pennington* to §1983 claims. By ap-

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[6]*See, The Marquette National Bank of Minneapolis v. First of Omaha Service Corporation*, 439 U.S. 299, 301 (1978).

plying *Noerr-Pennington* to the Civil Rights Act claim, any issue as to whether §85 of the National Bank Act confers a statutory "right, privilege or immunity" within the meaning of §1983 is rendered moot.

CONCLUSION

Based on the foregoing, it is respectfully submitted that the petition for a writ of certiorari be, in all things, denied.

Respectfully submitted.

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